IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. [redacted] 67

In re PAUL THEODORE CHEFF, PETITIONER

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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CITATIONS

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Paul Theodore Cheff, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered on January 27, 1965, finding petitioner guilty of criminal contempt and imposing upon him a sentence of imprisonment of six months.

OPINION BELOW

The opinion of the Court of Appeals issued January 27, 1965, is unreported, as yet, and is printed in Appendix B, *infra*, pp. 18-28. The judgment order of the Court of Appeals entered January 27, 1965, is printed in Appendix C, *infra*, pp. 29-32. The order of the Court of Appeals entered August 5, 1959, and the cease and desist order of the Federal Trade Commission (hereinafter called FTC) issued July 7, 1958, are printed in Appendix D, *infra*, at p. 33 and pp. 34-35, respectively.

JURISDICTION

The judgment of the Court of Appeals was entered on January 27, 1965 (Appendix C, *infra*, pp. 29-32). Peti-

tioner's timely motion, requesting that this judgment be vacated and that either a judgment of acquittal be entered or a new trial be ordered (Env. 7, Item 230),[1] was denied by the Court of Appeals on February 11, 1965 (Env. 7, Item 235). This Court, on February 15, 1965, extended the time for filing a petition for writ of certiorari to and including April 12, 1965.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether convicting petitioner of criminal contempt, based on his failure, as a corporate officer, to take certain affirmative actions neither expressly nor impliedly required by a narrowly-drawn, prohibitory court order is in violation of the right of fair warning guaranteed by the Due Process Clause of the Fifth Amendment.

2. Whether petitioner's conviction of criminal contempt

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[1] All record documents, including the transcript of testimony, have been placed in envelopes numbered 1 through 12 in order according to the item number assigned by the Clerk of the Court of Appeals which appears on the cover page of each document. All original exhibits received in evidence, except for certain stipulated exhibits which are attached to the pleadings of the prosecution and the Holland Furnace Company, are in two additional envelopes numbered 13 and 14.

The following abbreviations are used herein in citing to the record:

Env.	Envelope
Tr. Vol.	Transcript Volume
CX	Exhibit of Petitioner Cheff
PX	Prosecution Exhibit
H.A., Att.....(SX)....	Holland Furnace Company Answer, Attachment ..... (Stipulated Exhibit)

was an abuse of the Court of Appeals' contempt power since based upon a record devoid of substantial evidence from which petitioner could be found guilty beyond a reasonable doubt.

3. Whether, after denial of a demand for jury trial, the sentence of imprisonment of six months imposed upon petitioner is constitutionally permissible under Article III and the Sixth Amendment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The provisions of the United States Constitution involved are Article III and the Fifth and Sixth Amendments. The statutory provision involved is 18 U.S.C. § 401(3). The pertinent parts of these provisions are set forth in Appendix A, *infra*, p. 17.

STATEMENT OF THE CASE

In this case, petitioner was found guilty of criminal contempt and sentenced to imprisonment for a period of six months by the Court of Appeals for the Seventh Circuit for wilfully causing violations of a pendente lite order of that court enforcing a cease and desist order of the FTC.

On July 7, 1958, in an administrative proceeding entitled "In the Matter of Holland Furnace Company, a corporation, Docket No. 6203," the FTC entered an order commanding said corporation "and its officers, agents, representatives, and employees," in connection with the sale of furnaces and heating equipment in commerce, to cease and desist from eight specified practices found to constitute unfair methods of competition under the Federal Trade Commission Act (Appendix D, *infra*, pp. 34-35).

Thereafter, in the course of a proceeding initiated by the Holland Furnace Company (hereinafter sometimes called Holland) to review the FTC cease and desist order, the Court of Appeals for the Seventh Circuit, on application of the FTC, entered a pendente lite order on August 5, 1959, commanding the Holland Furnace Company to comply with the cease and desist order "until and unless said order . . . be set aside . . . or until further order of . . . [the] Court" (Appendix D, *infra*, p. 33).[2] Petitioner was not a party to the FTC proceedings or to the review proceedings in the Court of Appeals nor was he named in the court's pendente lite enforcement order. Both the FTC cease and desist order and the court's order enforcing the same were limited to prohibiting eight deceptive sales practices and neither contained any provision specifying what steps or affirmative actions were required to be taken by the company or its executives to prevent violations (Appendix D, *infra*, pp. 34-35).

On petition of the FTC filed pursuant to 18 U.S.C. § 401(3) and in conformity with Rule 42(b) of the Federal Rules of Criminal Procedure, the Court of Appeals, on April 26, 1963, issued a rule to show cause against petitioner (who, during the relevant period, had been a director, president and chief executive officer of Holland) and against six other directors and four other Holland executives; each of these persons was required to show cause why he should not be held in criminal contempt

> "by reason of having knowingly, wilfully and intentionally caused, and aided and abetted in causing, respondent Holland Furnace Company to violate and disobey, and fail and refuse to comply with . . . [the

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[2]. On November 7, 1961, the pendente lite order was made permenent by the Court of Appeals' affirmance of the FTC order. *Holland Furnace Co.* v. *FTC*, 295 F.2d 302 (7th Cir. 1961).

pendente lite order of the court] entered on August 5, 1959 . . ." (Env. 5, Item 27).[3]

Also on April 26, 1963, an order was entered appointing counsel for the FTC as attorneys to prosecute the proceeding on behalf of the court (Env. 5, Item 28).

Petitioner filed a verified answer to the rule to show cause denying that he had knowingly, wilfully or intentionally caused and aided and abetted in causing Holland Furnace Company to violate and fail and refuse to comply with the court's order of August 5, 1959 (Env. 5, Item 93).

Petitioner also filed a demand for trial by jury (Env. 6, Item 156), which demand was denied by order of the court entered on May 27, 1964 (Env. 6, Item 157).

The proceeding was tried by the Court of Appeals which heard evidence. On January 27, 1965, the court rendered an opinion (Appendix B, *infra*, pp. 18-28), and entered a judgment order: (1) finding that petitioner "knowingly, wilfully and intentionally caused, and aided and abetted in causing . . . violations by Holland Furnace Company" of the court's order of August 5, 1959; (2) adjudging him guilty of criminal contempt; and (3) sentencing him "to imprisonment for a period of six months. . . ." (Appendix C, *infra*, pp. 31-32).[4]

REASONS FOR GRANTING WRIT

This case raises important questions concerning the exercise by federal courts of the power to prosecute and

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[3] On petition of the FTC, the Court of Appeals had previously issued a rule to show cause against Holland Furnace Company on March 19, 1962 (Env. 2, Item 2).

[4] All other individual respondents were found not guilty except two former sales managers who were fined $500 each. Holland Furnace Company was found guilty and fined $100,000 and is seeking review in this Court by petition for certiorari filed March 10, 1965, No. 972.

punish for criminal contempt. The decision of the court below is in conflict with the decision of the Court of Appeals for the Ninth Circuit in *In re Floersheim,* 316 F.2d 423 (9th Cir. 1963) and contravenes the first essential of due process—the right of fair warning. Additional important questions are raised by the absence of any substantial evidence from which the Court of Appeals could find petitioner guilty beyond a reasonable doubt, and the length of the prison sentence imposed without a trial by jury. All of these questions deserve review by this Court in the exercise of its supervisory power over the administration of criminal justice in the federal courts.[5]

I.

The Decision of the Court Below Is In Conflict With a Decision of the Court of Appeals For the Ninth Circuit, and Petitioner's Conviction Is In Violation of the Right of Fair Warning

The order of August 5, 1959, on which this contempt proceeding was based did no more than enforce the provisions of the FTC cease and desist order, review of which was then pending in the Court of Appeals. The FTC order specified absolutely no affirmative action to be taken by

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[5] This is particularly so since the trial court disregarded specifically guaranteed procedural safeguards, and petitioner has no right of appellate review. Thus, the court below declined to make special findings of fact as petitioner had requested in a motion filed pursuant to Rule 23(c) of the Federal Rules of Criminal Procedure (Appendix B, *infra,* p. 20; Env. 7, Item 203). Moreover, petitioner was not afforded an opportunity to make a statement in his own behalf before sentence was imposed as is required by Criminal Rule 32(a) (Env. 11, Tr. Vol. 22, p. 2620).

Petitioner has no right of appeal since this proceeding originated in the Court of Appeals.

Holland or any of its executives but instead was limited to prohibiting eight specific deceptive sales practices (Appendix D, *infra*, pp. 34-35).

Petitioner's conviction was not based upon a charge or evidence that he personally engaged in any of the eight deceptive practices. Rather, the alleged direct violations of the eight prohibitions covered by the order arose out of actions by subordinate sales employees. These alleged violations involved but a few of Holland's thousands of employees in connection with some 66 out of millions of house calls made throughout the United States during the period of approximately 28 months that the pendente lite order was in effect (Env. 2, Item 14, H.A., Att. 55 (SX); Env. 10, Tr. Vol. 13, pp. 1519-20).

Further, petitioner was not convicted for having taken no action whatsoever to prevent violations by these subordinate sales employes. Indeed, the abundance of undisputed record evidence establishing the creation and execution of a program to bring about compliance and to control the practices of subordinate employees precluded any such contention. The following are some of the affirmative actions that were taken by petitioner and other Holland executives:

A special department, the Product Service Department, was set up to police sales practices (Env. 10, Tr. Vol. 14, pp. 1574-83; Env. 14, CX 8, 9, 23).

Numerous bulletins and directives were issued commanding compliance (Env. 2, Item 14, H.A., Att. 31, 32, 34, 35, 36, 37 (SX); Env. 10, Tr. Vol. 14, pp. 1606-08, 1641-54; Env. 14, CX 8, 10-B, 11, 12, 16, 17, 25, 26, 34, 35, 36).

Monthly meetings were held with division sales personnel at which the necessity for compliance was continually stressed (Env. 10, Tr. Vol. 14, pp. 1623-40,

1659-60; Tr. Vol. 15, pp. 1667-75; Tr. Vol. 16, pp. 1833-38; Env. 14, CX 20, 23, 24, 40, 41).

Many salesmen were discharged or demoted for engaging in the prohibited practices (Env. 2, Item 14, H.A., Att. 33 (SX); Env. 10, Tr. Vol. 16, pp. 1806-09, 1901; Env. 13, PX 87, 90; Env. 14, CX 5, 6, 7, 14, 16, 31, 32, 33).

Meetings were held with officials of various Better Business Bureaus both at the local and national level (Env. 10, Tr. Vol. 14, pp. 1569-70; Env. 14, CX 23).

Meetings were held with attorneys from the FTC at which compliance suggestions and information concerning complaints were requested but not provided (Env. 8, Tr. Vol. 1, pp. 100-01, 104-06; Tr. Vol. 2, pp. 162-64; Env. 10, Tr. Vol. 14, pp. 1568-69; Env. 14, CX 23).

The Court of Appeals, however, dismissed these actions as a "facade" and as "apparent" rather than real efforts to comply (conclusions which we shall show are totally unsupported by the evidence, see pp. 12-13, *infra*) and proceeded to find petitioner guilty of knowingly, wilfully and intentionally *causing* violations by subordinate employees by reason of his failure to change certain sales *policies* of Holland. But the unchanged policies upon which the court below relied involve such matters as selling products in the replacement market, compensating salesmen on a commission basis, the pricing of equipment, repairs and services, and Holland's corporate marketing structure,[6] and are entirely separate, distinct and different from the deceptive sales practices inhibited by the court order. The FTC order as enforced by the court in no way touched upon or required any change in these policies. Had the FTC or the

[6] The court below catalogued these unchanged policies in paragraph 3 of Section II of its opinion (Appendix B, *infra*, p. 25.)

court considered changes in these policies to be essential to effect compliance, provisions requiring such action could have been incorporated in the orders. *FTC* v. *National Lead Co.*, 352 U.S. 419, 430 (1957). But such was not done.

The holding of the court below, since bottomed upon a failure by petitioner to change sales policies not within the ambit of the order, is squarely in conflict with the decision of the Court of Appeals for the Ninth Circuit in *In re Floersheim*, 316 F.2d. 423 (9th Cir. 1963). That was a proceeding for criminal contempt of an order of the Court of Appeals enforcing an FTC cease and desist order prohibiting the use of certain deceptive types of skip trace forms. It was contended by the FTC that the forms used by the respondent were too "official looking" or "too demanding," that the color of paper used resembled that of checks and that the use of a Washington, D.C. address implied government involvement. The court rejected such contentions as a basis for a contempt conviction saying:

> "The short answer to these complaints is that the cease and desist order, as drawn, does not forbid such acts or use." 316 F.2d at 428.

Furthermore, petitioner has been convicted for failing to take affirmative action not even *impliedly* required by the prohibitions of the court order. Petitioner does not contend that a prohibitory order places no affirmative duties on corporate officers or that a criminal contempt conviction may not be based upon a failure of such officers to take action designed to prevent violations by subordinates. However, where, as here, a contempt conviction is based upon inaction so far removed from the provisions of the prohibitory order that the officer has no reason even to suspect that such action is required, it flies in the face of the right to

fair warning guaranteed by the Due Process Clause of the Fifth Amendment.

It is fundamental that no man should be held criminally responsible for conduct which he could not understand to be proscribed or required. *United States* v. *Harriss*, 347 U.S. 612, 617 (1954). Based on this principle, criminal statutes so vague and indefinite that men of ordinary intelligence must guess at their meaning and differ as to their application have been struck down as violative of "the first essential of due process of law." *Connally* v. *General Const. Co.*, 269 U.S. 385, 391 (1926). And the right of fair notice is violated to an even greater extent where a statute precise on its face "has been unforeseeably and retroactively expanded by judicial construction. . . ." *Bouie* v. *City of Columbia*, 378 U.S. 347, 352 (1964); *accord*, *Pierce* v. *United States*, 314 U.S. 306, 310-11 (1941).

Petitioner's conviction was based on just such an unforeseen and retroactive expansion by judicial construction, not of a statute but of a court order.[7] This is not a case where the order in question was merely vague. Rather, the order on its face was specific. It was limited to prohibiting eight deceptive sales practices. But the court below has read into it requirements of affirmative action relating to matters which no business executive could be expected to understand were within its scope. For example, we submit that petitioner could not reasonably have been expected to construe the order as requiring a change in a long-standing

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[7] The requirements of due process, of which fair warning is one, are clearly applicable to a proceeding for criminal contempt. *Levine* v. *United States*, 362 U.S. 610, 616 (1960). Accordingly, the principle laid down in the *Bouie* and *Pierce* cases, *supra*, with respect to construing a criminal *statute* applies with equal force to proscribe an unforeseeable and retroactive expansion by judicial construction of a *court order*.

practice of paying salesmen on a commission basis or as calling for a reduction in the selling prices of heating equipment.

It is respectfully submitted that petitioner's conviction, since squarely in conflict with the *Floersheim* case, *supra,* and since predicated upon an unforeseeable and *ex post facto* expansion of the narrow requirements of the court order in violation of the constitutional right of fair warning, warrants review by certiorari.

II.

There is No Substantial Evidence From Which to Find Petitioner Guilty Beyond Reasonable Doubt

The evidence in this record is manifestly insufficient to support the Court of Appeals' finding that petitioner knowingly, wilfully and intentionally caused and aided and abetted in causing violations of its pendente lite enforcement order. Indeed, we believe the record is so devoid of proof as to make petitioner's conviction a denial of due process under the teaching of *Thompson* v. *City of Louisville,* 362 U.S. 199 (1960). In any event, the record evidence falls far short of proving guilt beyond a reasonable doubt, the standard applicable in a criminal contempt proceeding. *Michaelson* v. *United States,* 266 U.S. 42, 66 (1924); *Gompers* v. *Bucks Stove & Range Co.,* 221 U.S. 418, 444 (1911).

Under the contempt charges brought against petitioner, it was incumbent upon the prosecution to introduce evidence sufficient to prove beyond a reasonable doubt:

(1) That there were violations of the court's order by subordinate employees of Holland Furnace Company;

(2) That petitioner acted "knowingly, wilfully and intentionally," *i.e.* with a *specific intent* to cause violations of the order; and

(3) That petitioner's knowing, wilfull and intentional conduct *actually caused* violations of the court order by subordinate sales employees.

Assuming there is some evidence to prove that subordinate sales employees did violate the order, there is simply no evidence whatsoever that petitioner acted with the requisite specific intent, or that his conduct was the cause in fact of such violations.

Specific Intent—The Court of Appeals, in the *first* paragraph of Section II of its opinion, reached the ultimate conclusion that petitioner was guilty of *knowingly, wilfully* and *intentionally* causing violations of the order, based upon a pyramid of subordinate conclusions contained in the *second* paragraph of Section II (Appendix B, *infra*, pp. 23-25). The net of these subordinate conclusions is that petitioner's actions to set up and carry out a compliance program were not bona fide but were designed to construct "an apparent compliance" and a "facade behind which to continue the condemned sales practices" (Appendix B, *infra*, pp. 23, 24). Since the record is wholly barren of any evidence showing that petitioner's actions were not undertaken and carried out in entire good faith, the ultimate conclusion respecting wilfulness (specific intent) is totally unfounded.

There is no direct evidence that petitioner's compliance efforts were part of a plan to erect a "facade" behind which violations could occur; moreover, the circumstances referred to by the court provide no basis for *inferring* the existence of any such scheme for two reasons.

First, many of the specified circumstances are themselves completely lacking in evidentiary support, and, indeed, some are precisely contrary to the record evidence. For example, the court's findings that petitioner, in the Holland house organ, the "Firepot," "complained of recommendations to discharge salesmen," and that with peti-

tioner's "knowledge and approval . . . salesmen whom Wabeke had recommended discharging were praised in the publication" (Appendix B, *infra*, p. 24) are completely unsupported.

Second, the remaining circumstances cited by the court are not rationally related to the conclusion sought to be inferred. For instance, the fact that petitioner personally did not meet with Better Business Bureaus to adjust complaints, or travel into the field to discuss compliance with company personnel, but, instead, delegated these duties to others (Appendix B, *infra*, p. 24), certainly does not permit an inference that he had a plan to construct a mere apparent compliance with the order.[8] And since there is no basis for inferring the existence of a sham compliance plan, such a normal business policy as delegating to other executives the responsibility for effectuating a compliance program certainly cannot be labeled as a lawful act done pursuant to an unlawful purpose.

It thus appears that the ultimate holding that petitioner *knowingly, wilfully* and *intentionally* caused violations of the order was based both upon subordinate conclusions having no evidentiary basis and which the court apparently fashioned entirely out of whole cloth, and upon inferences "so dogmatic . . . as to be wholly unwarranted." *Schware* v. *Board of Bar Examiners*, 353 U.S. 232, 251 (1957) (concurring opinion of Frankfurter, J.). Accordingly, there is a complete absence of any evidentiary predicate sufficient to establish the requisite specific intent.

Causation—The findings of the Court of Appeals on the element of causation are contained in the third paragraph

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[8] Petitioner, the chief executive officer of Holland, was responsible for all aspects of the operations of a company with some 400 branches in 41 states, with annual sales of 25 to 30 million dollars, and with some 7,000-8,000 employees, and hence obviously had to delegate many compliance duties to others.

of Section II of the opinion (Appendix B, *infra*, p. 25). The substance of the court's holding is that petitioner's failure to make substantial changes in Holland's sales policies and sales organization "contributed to a condition which lent itself to undisciplined sales practices," and that his unbending attitude toward the FTC cease and desist order and his confidence in eventually setting it aside constituted "an obstruction to change and to compliance with the court's order" (Appendix B, *infra*, p. 25). From the foregoing, the Court of Appeals inferred the ultimate conclusion that petitioner knowingly, wilfully and intentionally *caused* violations of the order.

The record is equally deficient on this essential element. Again, the findings with respect to many of the circumstances referred to in the opinion are themselves entirely unsupported. Thus, the court's ambiguous reference to petitioner's "unbending attitude toward the . . . cease and desist order" (Appendix B, *infra*, p. 25) has no evidentiary basis, and the reference to his confidence "in eventually setting . . . [the order] aside " (*ibid.*) is precisely contrary to the testimony and documentary exhibits (Env. 11, Tr. Vol. 18, pp. 2114-15; Env. 14, CX 7).

Further, there is not one word of testimony or one document in this record to support directly or inferentially that any failure by petitioner to make policy changes or his attutude toward the order *caused* a single proven violation of the order. Of equal importance is the fact that none of the sales policies and other matters relied upon by the Court of Appeals were required to be changed or were covered in any way by the FTC order as enforced by the court's order, and the same cannot constitutionally be construed by judicial ruling to be within the ambit of such orders for the reasons discussed at pp. 6-11, *supra*.

Neither due process nor the requirement of proof beyond a reasonable doubt is satisfied when a conviction is

based on a record so totally lacking in evidence to establish the essential elements of specific intent and causation. We respectfully submit that petitioner's conviction on this record constitutes a clear abuse of the contempt power and calls for review on certiorari by this Court.

III.

The Sentence of Imprisonment Imposed Upon Petitioner Raises a Constitutional Question Similar to One Now Pending Before This Court

A further question presented by this case is whether a sentence of imprisonment of six months may constitutionally be imposed upon petitioner in view of the fact that his demand for a jury trial was denied (Env. 6, Item 157). The majority opinion in *United States* v. *Barnett,* 376 U.S. 681 (1964) indicated that absent a trial by jury, the punishment that may be imposed for criminal contempt "would be constitutionally limited to that penalty provided for petty offenses." 376 U.S. at 695 n.12. In a dissenting opinion, the punishment limitations were equated to "trivial penalties." 376 U.S. at 751, 757 & n.44 (opinion of Goldberg, J.). The question of whether a six month prison sentence is within this undefined limitation remains open.

A similar issue is pending before this Court in *Harris* v. *United States, cert. granted,* 379 U.S. 944 (1964) (No. 526). Question 3 in *Harris* involves whether a "sentence of one year's imprisonment imposed . . . in a summary contempt proceeding is constitutionally permissible." Brief for Petitioner, p. 2.

We respectfully submit that the sentence imposed upon petitioner, absent a jury trial, raises a constitutional question under Article III and the Sixth Amendment which is equal in importance to the one in *Harris.* Accordingly, this Court should grant certiorari to resolve such question.

CONCLUSION

It is undisputed that the contempt power is peculiarly subject to abuse. The offense not only has "the most ill-defined and elastic contours in our law" but in addition is punished by judges who have concentrated in themselves "the responsibilities of lawmaker, prosecutor, judge, jury and disciplinarian. . . ." *Green* v. *United States*, 356 U.S. 165, 199, 200 (1958) (dissenting opinion of Black, J.).

Moreover, where the proceeding originates in a Court of Appeals with the consequent absence of any right of appeal, the harshness of the contempt power is even more pronounced. Due process does not require appellate review; however, we submit that in view of the unusual susceptibility of the contempt power to abuse—as suggested by the important questions presented and discussed above—the unavailability of appellate review should be given some independent significance in determining whether to grant certiorari.

For all of the reasons set forth in this petition, we urge that a writ of certiorari be issued.

Respectfully submitted,

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April 1965

APPENDIX A

Constitutional Provisions Involved

Article III, § 2, Par. 3 provides in pertinent part:

> "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed. . . ."

The Fifth Amendment provides in pertinent part:

> "No person . . . shall . . . in any criminal case . . . be deprived of life, liberty, or property, without due process of law. . . ."

The Sixth Amendment provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . ."

Statutory Provision Involved

18 U.S.C. § 401(3) provides:

> "A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—
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> • • • • •
>
> "(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command."

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1964 — JANUARY SESSION, 1965

No. 13671
In re: HOLLAND FURNACE COMPANY, et al.

[Filed] JANUARY 27, 1965

Before SCHNACKENBERG, KILEY and SWYGERT, *Circuit Judges.*

This criminal contempt proceeding was begun on petition of the Federal Trade Commission alleging that respondents "knowingly, wilfully and intentionally" violated and disobeyed an order of this court of August 5, 1959, directed against respondents, by failing and refusing to comply with said order. The Rules to Show Cause issued. Issues were joined by respondents' answers, and this court, without a jury,[1] heard evidence and arguments on the issues.

In the August 5, 1959 order of this court, respondents were "commanded forthwith to obey and comply" with an FTC order, entered July 7, 1958, "until and unless," the Commission order "shall be set aside upon review by this court or the United States Supreme Court, or until further order of this court."

[1] Following the Supreme Court's decision in *United States* v. *Barnett*, 376 U.S. 681 (1964), this court denied motions of certain respondents for jury trial.

The Commission order of July 7, 1958 was entered at the conclusion of hearings of proceedings against Holland Furnace Company charging unfair methods of competition and deceptive acts and practices in commerce. The order directed "respondent Holland Furance Company, a corporation, and its officers, agents, representatives, and employees, directly or through any corporate or other device" in selling or distributing Holland products or services, to cease and desist from:

(1) Representing, directly or indirectly, that any of its employees are inspectors or are employees or representatives of government agencies or of gas or utility companies.

(2) Representing, contrary to fact, that its salesmen or servicemen are heating engineers.

(3) Representing that any furnace manufactured by a competitor is defective or not repairable or that the continued use of such furnace will result in asphyxiation, carbon monoxide poisoning, fires, or other damage, or for any other reason, when such is not a fact.

(4) Tearing down or dismantling any furnace without the permission of the owner.

(5) Representing that a furnace which has been dismantled cannot be reassembled and used without danger of asphyxiation, gas poisoning, fires, or other damage, or for any other reason, when such is not a fact.

(6) Requiring the owner of any furnace which has been dismantled by respondent's employees to sign a release absolving the respondent of liability for its employees' negligence, or of any other liability, before reassembling said furnace.

(7) Refusing to immediately reassemble, at the request of

the owner, any furnace which has been dismantled by respondent's employees.

(8) Misrepresenting in any manner the condition of any furnace which has been dismantled by respondent's employees.

The Commission's order, as enforced by this court's August 5, 1959 order, remained in full force and effect and was made permanent by this court's affirmance of the Commission's order on November 7, 1961. *Holland Furnace Co.* v. *FTC*, 295 F.2d 302 (1961). The contempt charges before us cover the period from August 5, 1959 to the entry of the final judgment by this court.

Certain respondents made requests for findings of facts "specially," under Rule 23(c), and for "special findings."[2] The court, in lieu of making the "special findings" requested, makes its own findings of fact and conclusions of law on the record and transcript of evidence as follows:

I.

Holland Furnace Company is a Delaware corporation with principal offices in Holland, Michigan. From April, 1946 to May, 1962 respondent Paul T. Cheff was Holland's president and chairman of its board of directors, owning 6,004 shares of stock. His wife, Katherine Nystrom Cheff, respondent, was a director from March, 1935 to May, 1962,

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[2] "That, if any or all of the above-named respondents is held to have been in contempt of this Court's order of August 5, 1959, this Court make special findings of fact as to the conduct, events, and circumstances upon which such contempt conviction is based, including findings as to the conduct, events, and circumstances underlying any finding of a violation of that order by any other respondent in this proceeding, including the Holland Furnace Company, if such a violation is an element in the finding that any or all of the above-named respondents has been in contempt."

and owned 43,004 shares of stock. Her nephew, respondent Edgar P. Landwehr, was a director from April, 1945 to May, 1962, and owner of 24,410 shares of Holland stock. Respondents John D. Ames, Ralph Boalt, Robert H. Trenkamp, and George Spatta were directors, respectively, from April, 1954 to June, 1961, from April, 1953 to May, 1962, from April, 1953 to July, 1962, and from April, 1951 to February, 1962. Ames owned 200 shares, Boalt 200 shares, Spatta 500-1000 shares, and Trenkamp 200 shares of Holland stock.

Respondent Alvin W. Klomparens was vice president and sales manager from April, 1956 to March, 1960. Richard J. Koerner, respondent, succeeded Klomparens as sales manager, from April, 1960 to April, 1961, and was also vice president from April, 1961 to June, 1962. Respondent Henry Weyenberg was production manager and chief engineer of Holland from April, 1959 to April, 1960 and vice president after 1960. Jay A. Wabeke, respondent, was manager of Holland's Product Service Department from the time of its creation in September, 1959.

The parties to this proceeding stipulated that 164 "attachments" to the contempt petitions, 132 attachments to Holland's answer, and two attachments to the Commission's reply to Holland's answer "may be" received in evidence and be considered by this court as if affiants were witnesses; and that this court "may resolve" any conflicts in the affidavits and determine credibility of affiants. No concessions were made in the stipulation as to truth or falsity of the statements therein and as to whether respondents had power or authority over the "facts" stated in the affidavits or any responsibility for any alleged violations asserted therein. The parties waived right of confrontation of witnesses and right of cross-examination.

In its answer to the petition for contempt, Holland Fur-

nace Company admits that the conduct of its employees in fifteen transactions, involving twenty-five separate violations, involving the following customers of Holland, violated the August 5, 1959 order of this court:

ALLEN, Atlanta, Georgia
BIBEAU, Spokane, Washington
CLAYMANN, Seattle, Washington
CONDON, Denver, Colorado
EHRICH, Albert Lea, Minnesota
EWING, Peabody, Massachusetts
GRUMLING, Mansfield, Ohio
HENDRICKSON, Albert Lea, Minnesota
HOOKER, San Francisco, California
NIELSEN, Chicago, Illinois
SHELLABARGER, Akron, Ohio
STEWART, Seattle, Washington
TAYLOR, Cuyahoga Falls, Ohio
THOMPSON, Cuyahoga Falls, Ohio
WINK, Spokane, Washington

In addition, the testimony shows that the Attorney General of Minnesota brought an action against Holland for unfair and deceptive practices by its employees, and several attorneys general in other states contemplated or threatened similar action. This testimony and the fifteen admitted instances of twenty-five violations by respondent Holland Furnace Company of this court's order of August 5, 1959 represent, exemplify and illustrate the contempt of this court's order during the entire period covered by petition, throughout the entire territory in which respondent Holland Furnace Company operates, according to a regular and usual method by which the corporate respondent has in that period and in that territory sold and offered for sale its furnaces, heating equipment, and parts therefor.

We are convinced beyond a reasonable doubt, on the basis of the entire record, that Holland Furnace Company, acting through certain of its officers, agents, representatives and employees, through a "regular and usual" sales practice of its employees in commerce has "knowingly, wilfully and intentionally" violated and disobeyed in one or more instances each of the prohibitions of the August 5, 1959 order of this court; and accordingly we find the Holland Furnace Company guilty of criminal contempt of this court.

II.

We are convinced beyond a reasonable doubt, on the evidence in this case, that respondent Paul T. Cheff is guilty of "knowingly, wilfully and intentionally" causing and aiding and abetting in causing, in one or more instances, violations by Holland Furnace Company of each of the eight prohibitions in the August 5, 1959 order of this court.

There is abundant evidence from which we find that Cheff was the dominant head of Holland Furnace Company in the period during which the Holland sales practices subject of the Commission's cease and desist order occurred; that he was the dominant head of Holland when the Commission's hearings were conducted, when the cease and desist order issued, when the August 5, 1959 order of this court was entered, and thereafter until May, 1962; that he was well aware of the condemned sales practices and of the prohibitions in the order of this court; that following the entry of the order Cheff made no bona fide attempt to comply or achieve compliance with the order; that on the contrary he pursued a course of conduct designed to construct an apparent compliance with the order and to devise a defense against charges of violation; that he established the Product Service Department, not to

"discipline" the Holland organization or bring about compliance with this court's order, but as a facade behind which to continue the condemned sales practices; that his appointment of Wabeke to head the department was in furtherance of Cheff's plan to make no substantial change in Holland's sales practices since he could not help but know that Wabeke would not be effective in investigating complaints and disciplining the sales force; that Cheff had no intention of permitting Wabeke to be effective; that he frustrated Wabeke's since attempts to accomplish compliance with this court's order by telling Wabeke he had complete authority to discharge salesmen while telling others that Wabeke could only "recommend" discharge; that in the Holland Furnace Company house organ, the "Firepot," Cheff complained of recommendations to discharge salesmen, and that with the knowledge and approval of Cheff, salesmen whom Wabeke had recommended discharging were praised in the publication; that Cheff's occasional meetings with division sales managers, without Wabeke, at which he read from extensive notes to the eight or so in attendance, were apparent rather than real attempts to comply with this court's order; that instead of traveling to meet with Better Business Bureaus in various parts of the country to adjust serious complaints, he sent Wabeke and Weyenberg, neither of whom was suited to the purpose; that Cheff did not himself go out into the field to meet with branch managers or salesmen, or with Wabeke, to induce compliance with the order, and did not take pains to see that his entire sales organization understood the seriousness of compliance, as did his successors in management by bringing 2,000 salesmen to Holland, Michigan; that his bulletin, "The policy we work by," purporting to bring about compliance with the court's order, carefully avoided the word "discharge" and purposely avoided mentioning restraint on unauthorized dismantling of furnaces—that the bulletin was ineffective

to influence radical changes in Holland's sales policy, even if, and there is doubt of this, it reached the salesmen; and that Cheff's design in his relations with directors, employees or customers was to insulate Holland and himself from compliance with this court's order and from guilt for non-compliance.

Cheff made no substantial change after August 5, 1959 in Holland's sales practices or in the fundamental structure underlying the practices. Holland's policy remained the same: working on the replacement of furnaces instead of the original furnace market, operating on a straight commission basis with salesmen, and higher prices for Holland furnaces than its competitors, and realizing profit only on sales of furnaces, not on repairs or cleaning. The loose sales hierarchy, with tenuous relationship between Cheff and the sales managers, between them and the division sales managers, and between them and the branch managers, remained as it had been. Cheff remained aloof from the sales managers, division managers and salesmen. All this contributed to a condition which lent itself to undisciplined sales practices. Moreover, Cheff's unbending attitude toward the Commission's cease and desist order and his confidence in eventually setting it aside were an obstruction to change and to compliance with the court's order.

III.

Alvin W. Klomparens was employed by Holland in 1937, and served as sales manager and vice president from April, 1956 until April, 1960. He was succeeded by Richard J. Koerner, who was employed in 1948, and was a division sales manager when he was appointed by Cheff as sales manager to succeed Klomparens. After Koerner served in that position for one year, Cheff appointed him also a vice president.

We are convinced beyond a reasonable doubt, by the evidence in this record, that respondents Klomparens and Koerner aided and abetted in causing the proven violations of this court's order of August 5, 1959 during the respective periods of time each served as sales manager.

Both of these respondents were well aware of Holland's sales practices, of the proceedings before the Federal Trade Commission, and of the August 5, 1959 order of this court. The oral and documentary proof has convinced us beyond a reasonable doubt that each of these respondents willingly lent himself to Cheff's program of maintaining the sales practices which were prohibited by this court's order. They not only aided and abetted Cheff's design by disregarding what obligation the office of sales manager imposed on them in view of the order of this court, but they aided and abetted the violation of that order in an affirmative way. Klomparens edited the "Firepot," and requested, wrote and approved articles directed at the sales force with the intention of neutralizing any attempt by Wabeke's Product Service Department to bring about compliance. And Koerner, after his appointment as sales manager, wrote division sales managers that only he and Cheff had power to discharge and that sales managers must fight "obstacles" such as the Product Service Department and the Better Business Bureaus.

IV.

We find that the evidence does not prove beyond a reasonable doubt that Henry Weyenberg and Jay A. Wabeke caused or aided and abetted in causing respondent Holland Furnace Company to violate and disobey, and fail and refuse to comply with, the order of this court. They have not committed criminal contempts of this court and of its lawful authority.

During the period covered by the contempt citation herein, respondents Weyenberg and Wabeke had no real or effective power or authority over or responsibility for the sales operations of the company or the actions of its agents, representatives, and employees in connection with the offering for sale, sale, and distribution of its products and services, and no real or effective power or authority over or responsibility for the selection, employment, promotion, demotion, transfer, removal, or discharge of those agents, representatives and employees.

V.

We find the record shows that directors John D. Ames, Ralph Boalt, George Spatta, and Robert H. Trenkamp were grossly negligent in failing to perform fully their duties as directors of Holland Furnace Company and in relying upon Cheff's assurances that this court's order was not being violated or disobeyed. The gross negligence in this case does not, however, constitute criminal contempt. Trenkamp's position, as attorney for Holland during and after the proceedings before the Commission, imposed upon him a special responsibility, in addition to that which he had as director. It is questionable, to say the least, whether this professional responsibility was discharged by Trenkamp in a manner that reflected fully an awareness of this added responsibility.

There is no justification upon testimony in the hearing and the facts stated in their answers to the petition, which we are taking as true, to infer that these respondents did anything affirmatively or positively to cause or to aid and abet in causing violations of this court's order. We have a reasonable doubt that they knowingly, wilfully and intentionally caused or aided and abetted in causing respondent Holland Furnace Company to violate the order. We find

that the evidence does not prove beyond a reasonable doubt that directors Ames, Boalt, Spatta, and Trenkamp are guilty of the criminal contempt charged against them. The rule to show cause as to them is discharged.

What we have said in the next preceding paragraph about the above-named four directors applies equally to Katherine Nystrom Cheff and Edgar P. Landwehr, who filed no answers. The record is virtually silent as to them, and justifies only the inference that they were grossly negligent in their duties. It does not justify an inference that they knowingly, wilfully and intentionally caused or aided and abetted in causing the violation of this court's order. The rule to show cause as to them is discharged.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago 4, Illinois
January 27, 1965

Before
Hon. Elmer J. Schnackenberg, Circuit Judge
Hon. Roger J. Kiley, Circuit Judge
Hon. Luther M. Swygert, Circuit Judge

In re: HOLLAND FURNACE COMPANY } Petition for Criminal Contempt.

No. 13671

JUDGMENT ORDER

[Entered January 27, 1965]

This cause having come on to be heard in open court on the petition of the Federal Trade Commission, filed March 19, 1962, and the order to show cause as prayed in said petition, which order was issued March 19, 1962, and which order directed Holland Furnace Company to answer said petition and to show cause, if any there be, why it should not be adjudged in criminal contempt of this court, and punished for such criminal contempt, by reason of having knowingly, wilfully and intentionally violated and disobeyed, and failed and refused to comply with an order of this court entered on August 5, 1959, in Cause No. 12451, entitled on the records of this court "Holland Furnace Company, Petitioner, v. Federal Trade Commission, Respondent," all as appears from the said petition of the Federal Trade Commission, and the answer of Holland Furnace Company filed August 15, 1962, and its further answer filed November 27, 1962, a reply to said answer and further answer filed April 18, 1963 by the prosecutors ap-

pointed by this court, together with said prosecutors' motion for a finding that Holland Furnace Company has committed criminal contempt of this court and that the court adjudge punishment accordingly, as well as the answer of Holland filed September 30, 1963; and

This cause also having been heard on the verified petition filed April 19, 1963 by the attorneys appointed to prosecute on behalf of the court, which petition named as additional respondents herein Paul Theodore Cheff, Katherine Nystrom Cheff, Edgar P. Landwehr, John D. Ames, Ralph Boalt, Robert H. Trenkamp, George Spatta, Alvin W. Klomparens, Richard J. Koerner, Henry Weyenberg and Jay A. Wabeke; and the answer of said additional respondents filed herein, including the amendments to answer and a supplemental answer, the prosecution's replies to all of said respondents' answers, and the court having reserved its ruling on the motions of respondents Wabeke and Weyenberg that the order to show cause be discharged as to them; and

The court having heard and considered the evidence offered in open court in support of the petitions and the evidence offered by various respondents, and the cause having been submitted to the court thereon, and the court having considered the motions of the various respondents for a discharge of the rule to show cause and having considered the various briefs and memoranda of law filed by counsel representing all respondents and said prosecutor, and the court having this day filed a written opinion which makes findings of fact in this case;

The court finds that, as to the respondents Wabeke and Weyenberg, it has not been proved by evidence beyond a reasonable doubt that they knowingly, wilfully and intentionally caused, or aided and abetted in causing respondent

Holland Furnace Company to violate, disobey and fail and refuse to comply with said order of this court entered on August 5, 1959.

As to respondent Katherine Nystrom Cheff, the court finds that it has not been proved by evidence beyond a reasonable doubt that she knowingly, wilfully and intentionally caused, or aided and abetted in causing respondent Holland Furnace Company to violate, disobey and fail and refuse to comply with said order of this court entered on August 5, 1959.

As to the respondents Edgar P. Landwehr, John D. Ames, Ralph Boalt, Robert H. Trenkamp and George Spatta, the court finds that it has not been proved by evidence beyond a reasonable doubt that they knowingly, wilfully and intentionally caused, or aided and abetted in causing respondent Holland Furnace Company to violate and disobey, and fail and refuse to comply with said order of this court entered on August 5, 1959.

It Is Therefore Ordered that said rule to show cause is hereby discharged as to said Henry Weyenberg, Jay A. Wabeke, Katherine Nystrom Cheff, Edgar P. Landwehr, John D. Ames, Ralph Boalt, Robert H. Trenkamp and George Spatta.

And having considered the evidence offered in open court and the admissions made in the answer of respondent Holland Furnace Company, the court finds that it has been proved beyond a reasonable doubt that said respondent knowingly, wilfully and intentionally violated, disobeyed, failed and refused to comply with said order of this court entered on August 5, 1959; that, as to respondents Paul Theodore Cheff, Alvin W. Klomparens and Richard J. Koerner, the court finds that it has been proved beyond a reasonable doubt that they and each of them knowingly,

wilfully and intentionally caused, and aided and abetted in causing, the aforesaid violations by Holland Furnace Company of the said order of this court, entered on August 5, 1959; and said Company and Cheff, Klomparens and Koerner have thereby committed criminal contempt of this court and of its lawful authority.

It Is, Therefore, Ordered that said Holland Furnace Company, Paul Theodore Cheff, Alvin W. Klomparens and Richard J. Koerner be and they are hereby each adjudged in criminal contempt of this court, by reason whereof the court imposes a fine on said Holland Furnace Company of One Hundred Thousand Dollars and costs to be taxed by the clerk of this court, payable forthwith, and that execution issue therefor; and also by reason whereof the court sentences Paul Theodore Cheff to imprisonment for a period of six months and he is ordered committed to the custody of the Attorney General of the United States or his authorized representative for imprisonment for said period of six months; and also by reason whereof the court sentences the respondents Alvin W. Klomparens and Richard J. Koerner each to pay a fine of Five Hundred Dollars forthwith, and in default of payment of said fine each is to stand committed to the custody of the Attorney General of the United States or his authorized representative for imprisonment until said fine be paid or until otherwise discharged as provided by law, said fines and costs to be payable to the clerk of this court, either in United States currency or a bank's certified check.

It Is Ordered that the clerk deliver a certified copy of this judgment order and commitment to the United States marshall and that the said copy serve as the commitment of those respondents subject to committal as aforesaid.

APPENDIX D

[Order of the Court of Appeals for the Seventh Circuit, Entered August 5, 1959, in a Proceeding Entitled "Holland Furnace Company, Petitioner, v. Federal Trade Commission, Respondent," being Cause No. 12451]

"This case came on for consideration on respondent's motion for an order commanding petitioner Holland Furnace Company to obey and comply with the order to cease and desist entered against it by respondent Federal Trade Commission on July 7, 1958, unless and until said order shall be set aside upon review by this Court or by the Supreme Court of the United States, and upon petitioner's answer to said motion.

"Upon consideration whereof it is the judgment of this Court that issuance of the order prayed for is necessary to prevent injury to the public and to petitioner's competitors pendente lite; wherefor it is

"ORDERED that respondent's aforesaid motion be, and it hereby is, granted, and it is

"ORDERED that petitioner be, and it hereby is, commanded forthwith to obey and comply with the order to cease and desist entered against it on July 7, 1958, in a proceeding before respondent entitled 'In the Matter of HOLLAND FURNACE COMPANY, a corporation, Docket No. 6203,' until and unless said order to cease and desist shall be set aside upon review by this Court or by the Supreme Court of the United States, or until further order of this Court.

/s/ ELMER J. SCHNACKENBERG,
Judge

/s/ JOHN S. HASTINGS
Judge

/s/ FRED L. WHAM
Judge"

[Cease and Desist Order of the Federal Trade Commission, Entered on July 7, 1958, in a Proceeding Entitled "In the Matter of Holland Furnace Company, a corporation," being Docket No. 6203][9]

"ORDER

"IT IS ORDERED, That respondent Holland Furnace Company, a corporation, and its officers, agents, representatives, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution in commerce, as 'commerce' is defined in the Federal Trade Commission Act, of furnaces, heating equipment, or parts therefor, do forthwith cease and desist from:

"(1) Representing, directly or indirectly that any of its employees are inspectors or are employees or representatives of Government agencies or of gas or utility companies.

"(2) Representing, contrary to fact, that its salesmen or servicemen are heating engineers.

"(3) Representing that any furnace manufactured by a competitor is defective or not repairable, or that the continued use of such furnace will result in asphyxiation, carbon monoxide poisoning, fires, or other damage, or that the manufacturer of such furnace is out of business, or that parts of such furnace are unobtainable, unless such are the facts.

"(4) Tearing down or dismantling any furnace without the permission of the owner.

"(5) Representing that a furnace which has been dismantled cannot be reassembled and used without danger

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[9] This order, contained in the hearing examiner's initial decision, *Holland Furnace Co.*, 55 F.T.C. 55, 90-91 (1958), was adopted without change by the Commission in its opinion denying Holland's appeal, as follows, 55 F.T.C. 91, 95:

"the findings, conclusions and order contained in the initial decision are adopted as the decision of the Commission."

of asphyxiation, gas poisoning, fires, or other damage, or for any other reason, when such is not a fact.

"(6) Requiring the owner of any furnace which has been dismantled by respondent's employees to sign a release absolving the respondent of liability for its employees' negligence, or of any other liability, before reassembling said furnace.

"(7) Refusing to immediately reassemble, at the request of the owner, any furnace which has been dismantled by respondent's employees.

"(8) Misrepresenting in any manner the condition of any furnace which has been dismantled by respondent's employees."